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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 802

JESSE S. SHIMA,

Petitioner,

vs.

THOMAS A. BROWN.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, BRIEF IN SUPPORT THEREOF, AND MOTION AS TO THE RECORD.

JOHN WATTAWA,
V. O. HILL,
Counsel for Petitioner.

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THOMAS A. BROWN.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable the Chief Justice and the Associate Justices:

Jesse S. Shima, petitioner, prays for the issuance of a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia, entered January 18, 1943, in this cause, its number 8301 (R. 35), modifying a judgment of the District Court of the United States for the District of Columbia. The opinion of the Court of Appeals appears in the record herein (R. 33, 34), and is reported at this time in 6 *Federal Rules Service* 53 e. 32, Case 1.

Questions Presented.

I.

Was it intended, by the provisions of Federal Rule of Civil Procedure 53 (e) (3), to repeal or invalidate the Acts of Congress which comprise Sections 102-106, Title 16, District of Columbia Code, 1940 (31 Stat. 1230, 1231)?

II.

If so intended, has this Court the Constitutional power to receive and exercise a delegation of authority to repeal at its discretion an Act of Congress?

III.

Were any substantive rights of the petitioner abridged or modified by the application of said Rule, in the place of the Acts of Congress which comprise said Sections of the District of Columbia Code?

Statutes and Federal Rule Involved.

(a.)

Section 102, Title 16, of said Code:

"In actions at common law grounded upon an account, or in which it may be necessary to examine and determine upon accounts between the parties, the court, in its discretion, at any stage of the cause, may order the accounts and dealings between the parties to be audited and stated by the auditor of the court or by a special auditor to be appointed by the court for the purpose; in which case, if a jury shall have been sworn, they shall be discharged. The course of proceedings before the auditor shall be the same as in cases in equity referred to him. When his audit is completed the auditor shall file his report and account in the clerk's

office and give notice thereof to the parties or their attorneys, and at the expiration of thirty days after said notice judgment may be entered, on motion of either party, in accordance with said report and account, unless exceptions are filed thereto for errors in law or fact therein. The party excepting thereto shall point out particularly the item or items in such report and account excepted to, and state the grounds of such exception, and annex to his exceptions a certificate of counsel that, in his opinion, the matters of law therein stated are well founded in law, and an affidavit of such party that the exceptions are not filed for delay, and that the allegations of fact in said exceptions are true to the best of his knowledge and belief, and a copy of said exceptions shall be served on the opposite party or his attorney. (Mar. 3, 1901, 31 Stat. 1230, ch. 854, Par. 254; June 30, 1902, 32 Stat. 528, ch. 1329.)"

Section 103, Title 16, of said Code:

"When such exceptions are filed, the court shall enter the cause on the trial calendar of the term in which they are filed in its proper place, and the issues made by said exceptions shall be tried and determined in the same manner as other issues of law or fact made by the pleadings in an action at common law, and any part of such report and account not so excepted to shall be adjudged to be conclusive between the parties on such trial. (Mar. 3, 1901, 31 Stat. 1231, ch. 854, Par. 255.)"

Section 104, Title 16, of said Code:

"If, in the opinion of the court, such issues are so numerous as to create confusion the court may, in its discretion, direct evidence to be received and considered by the jury as to a part of said issues, and direct the jury to retire and conclude as to the same before hearing the evidence as to the other issues, and this to repeat as often as may be necessary, the final conclusion of the jury as to all the issues to be announced as

their verdict; or may submit the different issues to the same jury at different times for their separate verdicts thereon, or submit such issues to different juries; or may pursue such other course as the rules of the court may prescribe to facilitate the determination of such issues. (Mar. 3, 1901, 31 Stat. 1231, ch. 854, Par. 256.)"

Section 105, Title 16, of said Code:

"If only general, immaterial, or frivolous exceptions are made or they are filed without the certificate of counsel and affidavit of exceptant, required as aforesaid, they may be overruled by the court or a justice at chambers, on notice and motion, and judgment entered as if no exceptions had been filed. (Mar. 3, 1901, 31 Stat. 1231, ch. 854, Par. 257.)"

Section 106, Title 16, of said Code:

"Upon the conclusion of such trial or trials the court shall enter judgment upon the auditor's report as affirmed or corrected by the findings of the jury. (Mar. 3, 1901, 31 Stat. 1231, ch. 854, Par. 258.)"

(b)

Act of June 19, 1934, Ch. 651:

"Be it enacted * * * That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

"Sec. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil

action and procedure for both: *Provided, however,* That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session. (Act of June 19, 1934, c. 651, Secs. 1, 2 (48 Stat. 1064), U. S. C., Title 28, Secs. 723b, 723c.)

(c)

Federal Rule of Civil Procedure 53 (e) (3):

"In Jury Actions. In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report."

Jurisdiction.

This Court has jurisdiction under Section 240(a) of the Judicial Code, as amended by the Acts of February 13, 1925, and of June 7, 1934, and by virtue of alleged violation of the United States Constitution.

Petitioner's timely petition for rehearing (R. 35) was denied by the Court of Appeals February 10, 1943 (R. 42).

Statement of the Case.

Respondent sued petitioner June 3, 1938, in said District Court for $4,216.00 with interest from 1930, for board, including room, claimed to have been furnished to petitioner and wife under an agreement by petitioner to pay "a fair and reasonable sum". Petitioner denied making the agreement; and the periods, if any, in which board was furnished under it, were in dispute. (Respondent's statement of ac-

count listed about ninety-seven items, including board for ninety months at $50.00 per month, and seven payments, all of which were contested (R. 33).

Respondent on October 18, 1938, demanded jury trial (R. 29).

The first trial took place October 25 to November 1, 1940, with resulting verdict by jury, and judgment, for respondent for $1,016.00 (R. 17, 18). On motion of respondent, which was opposed by petitioner, the Court set aside said said verdict and judgment; and upon written consent of the parties referred the cause to the Auditor of said District Court to state the accounts between the parties, pursuant to said District Code provisions (R. 18). Respondent's later motion for instructions to the Auditor under that reference was denied (R. 19), the cause going to the Auditor on all issues. He held eight hearings, about thirty witnesses in all appearing. Extensive briefs were filed, and oral arguments had, the expense under such reference approximating $1,000.00 (R. 24), including Auditor's costs of $785.00.

The Auditor filed his Report with the District Court March 30, 1942, giving notice of such filing to the parties as required under said District Code provisions. He found for respondent for either $1,224.99 or $2,575.82, according as the Court might decide a question of law, namely whether the Statute of Limitations barred part of the claim (R. 33).

The cause being shortly thereafter assigned for further jury trial, petitioner applied to stay such assignment until after the expiration of the thirty-day period allowed under said Code provisions for filing any exceptions to the Auditor's Report; but the District Court by Memorandum filed April 23, 1942, ruled that as said Code provisions are procedural, they were repealed by the Federal Rules, and that the thirty-day period for exceptions was no longer applicable, and that therefore petitioner's application failed (R. 30, 31).

Petitioner thereafter and within thirty days from the filing of the Auditor's Report, filed exceptions to said Report (R. 19), as permitted under said District Code provisions. Respondent filed no exceptions or objections at any time (R. 33).

When the cause came on again for trial, petitioner moved to withdraw his exceptions as permitted under *Gilbert* v. *Association*, 21 App. D. C. 344, and to have the Report confirmed without any further trial, as "there would then be no exceptions filed in the case to the Report under the Statute in effect in the District of Columbia governing such matters" (R. 20). The Court denied the motion, holding in effect that the rule governed; and the case was again tried to a jury on all issues (R. 25, 33), the Auditor's Report being placed in evidence as permitted under the Rule. Verdict was rendered for respondent for $2,750.00 "without interest" (R. 26, 27). The Court added interest from the time suit was filed (R. 28).

Petitioner urged on his appeal to the Court of Appeals (a) that the District Court erred in not granting his said motion to be allowed to withdraw his said exceptions, and to have said Report confirmed, and its findings adjudged as final, without further trial, as provided under said Code provisions, and that therefore the verdict thereafter rendered was invalid, and that the cause should be remanded with instructions to vacate judgment entered upon that verdict, and to grant said motion; (b) that independently of said contention the District Court erred in adding interest.

The Court of Appeals modified the judgment by striking interest, but declined to sustain petitioner's contention (a) above, observing therein in part as follows (R. 34):

> "As the question is procedural, the Rule (Federal Rule 53 (e) (3)) invalidates the contrary provisions

of the (District of Columbia) Code.[4] The result seems unfortunate. Since it is desirable that parties and courts be spared the burden of re-trying issues, it seems desirable to require parties who wish issues re-tried to a jury to file, within a limited time, objections to a Master's findings on the same issues. But the District Court was bound by the Rule, and properly refused to 'confirm' the auditor's report."

February 1, 1943, petitioner filed Petition for Rehearing (R. 35-41), which was denied February 10, 1943 (R. 42).

Reasons Relied Upon for Allowance of the Writ.

In holding that the question is only procedural, and that therefore Federal Rule 53 (e) (3) invalidates the contrary provisions of the District of Columbia Code, which are Acts of Congress, the Court of Appeals has decided questions of general importance, relating to the application of the Constitution and to the construction of statutes of the United States, which have not been, but should be, settled by this Court. It also appears that the Court of Appeals has not given proper effect to this Court's decision in *Sibbach* v. *Wilson and Co., Inc.*, supra.

(a.)

The issue of the legality of the purported repeal, by said Rules, of Acts of Congress, whether the incidental question be procedural or not, is of general importance. It is of particular interest to the Bench and Bar, and to Congress. *Congressional Record,* 75th Congress, Third Session, Vol. 83, No. 117, Wednesday, June 8, 1938, pages 11159 to 11169. The Chairman of the Senate Judiciary Subcommittee on that date observed on the Floor of the Senate in part as follows, following presentation of a resolution for post-

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[4] "[4] *Sibbach* v. *Wilson and Co., Inc.*, 312 U. S. 1" (Parenthetical matter supplied).

ponement of the effective date of said Rules of Civil Procedure (page 11163):

> "This is more than 'repeal by implication'. It is something unheard of in the history of legislative bodies. It would be sanctioning by silence repeals by others not having legislative powers, and outside of legislative halls, without Congress even knowing or being informed of the laws which are thus erased from the statute books by implication. It would be abandonment of the function of Congress to legislate; for it is as much the duty of Congress, and of Congress alone, to change the laws and to repeal the laws as it is to enact the laws. The duty of Congress to decide for itself whether laws should be repealed is so clearly a part of the warp and woof of our Constitution that it is idle to say that the performance of this duty may be excused because of the eminence of the gentlemen who have formulated the implied repeals and the long study which they have given to the subject."

(b.)

There is involved here, not only the question of the power of Congress to delegate authority to repeal an Act of Congress, but also the Constitutional power of this Constitutional Court to receive such delegation, or to exercise any delegation of legislative power, the repeal of an Act of Congress being as much an act of legislation as the enactment of an Act of Congress.

(c.)

Sibbach v. *Wilson*, supra, a 5-to-4 decision, does not answer the above fundamental question, as it involved, not a Federal statute, nor a conflicting Act of Congress, as in the cause at bar, but merely the common law of Illinois and of Indiana. Accordingly this case is not ruled by *Sibbach* v. *Wilson*.

Moreover, under *Sibbach* v. *Wilson* it appears that there was not intended the complete and unconditional repeal of the Conformity Act by the Rules, as the decision of the Court of Appeals implies or assumes, but rather a *pro tanto* repeal, that is, repeal only "so far as such rules are within the authority conferred" (Headnote, *Sibbach* v. *Wilson*).

(d.)

In *Fennell* v. *Bache,* 74 App. D. C. 247, 123 F. (2d) 905 (certiorari denied, 62 S. Ct. 359, 86 L. ed. 257), the Court of Appeals, through Mr. Justice Rutledge, said in part at page 906:

> "The trial court's order necessarily determined that the common law procedure (in the District of Columbia) was not changed by the Federal Rules. We have to determine whether this decision was right." (Parenthetical matter supplied.)

In holding that such decision was right, the Court of Appeals commented upon the hardships accruing to a plaintiff under its said ruling, but stated (page 908) that "we think it more appropriate for such sweeping change as would be required by a holding in accordance with the plaintiff's view, to be made by the Congress rather than by ourselves." If common law procedure in the District of Columbia has not been changed by the Federal Rules, then surely the procedure therein, as established by express Acts of Congress, has not been so changed.

Petitioner relied before the Court of Appeals upon *Fennell* v. *Bache,* supra, and cited the same, but that Court makes no mention of said decision in its opinion herein (R. 33, 34), and does not specifically reverse the same. It would appear, therefore, that two conflicting, but binding, decisions now exist as to the applicability of the Feleral

Rules to procedure in the District of Columbia, a situation requiring rectification by this Court.

(e.)

Said Act of Congress of June 19, 1934, provides that "said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."

Accordingly, if it shall be the decision of this Court that it has the constitutional power to receive a delegation of authority to repeal an Act of Congress, and that by said Rule it intended to repeal or invalidate said Code provisions, then it becomes necessary to determine whether said Code provisions, and like provisions in other jurisdictions, provide or provided substantive rights to a litigant within the purview of said Act of June 19, 1934, which rights may not, under that Act, be abridged or modified by the Federal Rules. The efficient administration of Justice under such Rules requires, it is submitted, the establishment by this Court of more clearly defined standards for determining and distinguishing the substantive rights which stand protected under that Act.

The District Code provisions in question have been in effect in the District of Columbia for many years. They have served a most useful purpose in simplifying issues, and in minimizing the length and expense of litigation, thereby promoting the ends of justice, a fact recognized by the Court of Appeals itself which, in holding that they were invalidated by the Rule, nevertheless observed (R. 34):

> "The result seems unfortunate. Since it is desirable that parties and courts be spared the burden of retrying issues, it seems desirable to require parties who wish issues re-tried to a jury to file, within a limited time, objections to a master's findings on the same issues."

The Court of Appeals seems to indicate by the above comment that although it deems the rights herein involved to be only procedural, they are nevertheless exceedingly substantial. And, in the case at bar, the result renders nugatory the wise admonition contained in Federal Rule 1 that said Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."

Conclusion.

Wherefore, it is respectfully submitted that this petition for allowance of a writ of certiorari should be granted.

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Attorneys for Petitioner.